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STATE REGULATION OF WAGES AND PRICES OF COMMODITIES.

Are the wages for which we work or which we pay, the price of the food and clothing and other necessities of life which we buy and sell, the terms of the contracts which we make in our daily business dealings with our fellowmen, to be fixed for us hereafter by our allwise state legislatures? Kansas, the Sunflower State, out of which have come so many new experiments in government, says they are. In fact so accustomed have her sister states become to the innovations from Kansas that they have ceased to be surprised at anything she may do. It would seem that every seed of every flower of her floral emblem contains an embryo pod or issue awaiting only the magic touch of the legislative gardener to germinate into a new variety.

We are all more or less familiar with the growth of the methods devised for the settlement of disputes between employer and employee. The history of the relation, the means adopted by one side or the other, successful and otherwise, may be found in the printed volumes of our law reports as well as in tons of literature on the subject written from every possible angle and presenting the views of all parties. We have seen the lockout on the part of the employer to force his employees to bend to his will, the growth of the labor union with its ever ready strike, the various methods of arbitration conducted directly between the employer and employee or through the additional aid of third persons both private and official. In the exercise of its war powers Congress has gone the limit in the regulation and control of the production, manufacture and transportation of the necessities of life. But until the Kansas act no state has attempted in the exercise of its police power to bring under its supervision the entire industrial life within its borders, including the regulation of prices

of food and clothing and the direction of the relation between employer and employee in all its phases. In this act we find the almost complete discard of the constitutional guaranty of life, liberty and property, the sanctity of private contract, which heretofore have been more or less recognized in all attempts by the government to control the industrial relations of its citizens. So radical are its terms that so eminent a lawyer as Mr. George W. Wickersham is moved to say of it in a recent article in the *American Law Review,* that there has been asserted a principle of legislative control of private industry "which constitutes the longest step towards state socialism ever taken by an American commonwealth, not even excepting the North Dakota state business enterprises."

The immediate cause of this attempt at state regulation of private business was the inconvenience and danger threatened by the recent coal strike. The legislature, however, was not content with the mere regulation of the mining business of the state but has attempted to regulate and, if judicial history repeats itself, will succeed in regulating, practically the entire industrial life of the state. The act known as the "Industrial Court Law" creates a so-called "Court of Industrial Relations" and through it seeks to control the conduct and operation of the various industries made subject to its terms. Included among these, in addition to the public utilities generally accepted as proper subjects of state regulation, are the business of mining substances used for fuel, and the manufacture, production and transportation of articles of food and clothing. It is provided that these industries "are determined and declared to be affected with a public interest and therefore subject to supervision by the State * * * for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this State and in the promotion of the general welfare." It is further provided that it is quite "necessary for the public peace, health and general welfare of the people of this State that the industries, employments, public utilities and common carriers herein specified shall be operated with reasonable continuity and efficiency in

order that the people of this State may live in peace and security, and be supplied with the necessaries of life. No person, firm, corporation, or association of persons shall in any manner or to any extent, wilfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the purpose and intent of the provisions of this act; nor shall any person, firm, corporation, or association of persons do any act or neglect or refuse to perform any duty herein enjoined with the intent to hinder, delay, limit or suspend such continuous and efficient operation as aforesaid, except under the terms and conditions provided by this act." Practically every phase of the conduct of these industries is made subject to the provisions of the act including working and hiring conditions, hours of labor, rules and practices, wages and the right to strike. And its terms apply to employers and employees alike.

With respect to wages and income it is declared to be necessary "for the promotion of the general welfare that workers engaged in any of said industries, employments, utilities, or common carriers shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital invested therein shall receive at all times a fair rate of return to the owners thereof." And the Industrial Court is given power to fix both after due hearing.

With respect to the right to strike the act specifically acknowledges the right of the individual to quit his employment at any time, but provides that "it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, em-

ployments, public utilities, or common carriers governed by the provisions of this act."

State control and operation of any of the industries affected by the act through the Industrial Court are provided for in case of their threatened suspension or cessation as follows: "If it shall appear to said court that such suspension, limitation, or cessation shall seriously affect the public welfare by endangering the public peace, or threatening the public health, then said court is hereby authorized, empowered and directed to take proper proceedings in any court of competent jurisdiction of this State, to take over, control, direct and operate said industry, employment, public utility or common carrier, and also a fair wage to the workers engaged therein, during the time of such operation under the provisions of this section."

As the basis of its right to invade the private business relations of its citizens the state sets up that oft invoked elastic power known as the police power which someone has loosely defined as "the power to pass unconstitutional laws." Chief Justice Browne of the Florida Supreme Court expresses the same idea when in speaking of it in a recent address before the law class of the University of Florida, he said: "A legal doctrine has taken root in our government—sanctioned, approved and strengthened by judicial decisions, that threatens, and if it has not already destroyed, has seriously impaired constitutional guaranties for the protection of life, liberty and property, and prepared the way for their future destruction. I refer to what is known in the vocabulary of American constitutional law as The Police Power, but which as extended and approved by recent decisions is a Super-constitution." The courts define it generally as the power inherent in sovereign states to enact laws necessary for the preservation of the public health, morals, safety and welfare. Volumes could be written of the history and growth of this power. The purpose of this article, however, is limited to setting out the leading cases dealing with its extension to conditions similar to those embodied in the Kansas act. With these as precedents the power might be said in the last analysis to be wholly a discretionary one lodged in the governing body, whose decision as to what is best for the general welfare of the public is final.

As was said in *Lawton* v. *Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385: "The State may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

It is true that there is a supposed limitation on this power, and it has often been said that the determination as to what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts. In theory the state in the exercise of its police power is forbidden to enact laws which are so arbitrary, unreasonable or extravagant as to constitute an abuse of power, and the courts invariably tell us this when upholding some law taking from the public a right long considered as personal and inalienable. We are all familiar with the opinion which declares that while it is admitted that there is a well defined limitation on the exercise of the police power, it cannot be said to apply to the particular facts under consideration. Some day somebody may discover a peculiar state of facts that does exceed the legitimate exercise of the police power and which does violate this mythical limitation on its exercise, but it is difficult to imagine what possible conjunction of command and "verboten" can fulfil the bill. Lawyers and learned judges have attempted to conjure up the awesome results likely to follow the precedent set by upholding some particular inroad on the personal liberties of the people; they have pictured the complete divesting of the freedom of individual thought and action which might logically follow, and have endeavored by the argument of reductio absurdum to forestall the breaking down of the protection afforded to personal liberty by the constitution. We are familiar with the almost invariable answer of the courts: "True such a state of facts might arise, though it is not probable, and when it does it will be time to deal with it. For the present it is sufficient to say that the law under consideration does not go to such extremes and is a valid exercise of the police power." Step by step, however, the lawmaking bodies have stretched this power to cover the very conditions cited to show that the milder invasion was invalid. And when a new law comes before the

courts for construction we find a repetition of the same procedure, viz., the lawyers and dissenting judges working their imaginations overtime and holding up new and fearful results likely to follow the upholding of this new inroad on the private life of the people, and the courts handing down the same old stereotyped reply—maybe so, maybe so, but the present law does not go to that extent. Really it would seem to be advisable for these liberty loving lawyers and judges to refrain from picturing the possible fearsome extent to which some future lawmaking body may feel emboldened to go on the strength of the court's opinion in upholding a particular law. They probably suggest to the legislator some field of human action, some particular liberty or pleasure, which the law has overlooked and which he may never have thought of for himself. In fact a perusal of the dissenting opinions in a few of the leading cases dealing with this subject would seem to bear out this theory.

In *Munn* v. *Illinois,* 94 U. S. 113, 24 U. S. (L. ed.) 77, decided in 1876, we find the pioneer case in which the exercise of the police power by a state over the hitherto supposedly private business affairs of its citizens is upheld by the Supreme Court. This case involved the power of the State to regulate grain elevators and warehouses, among other things fixing prices to be charged for storage, etc. Two justices (Field and Strong) dissented from the majority opinion and the extent to which the doctrine laid down might be carried in future was stated as follows: "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of the majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the

court, an interest in the use of the buildings, and 'he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States." Justice Field must have been endowed to some extent with the gift of prophecy as he looked into the future and pictured the invasions of private rights to which the decisions of the majority of the court might lead. His forecast of the regulation of the relation of landlord and tenant, the fixing of rents that might be charged, etc., finds its fulfilment to a greater or less extent in the recently enacted rent laws of New York, which so far have been sustained at each ascending step along the judicial highway.

In *Budd* v. *New York,* 143 U. S. 517, 12 S. Ct. 468, 36 U. S. (L. ed.) 247, upholding the New York law fixing among other things the minimum charge for transferring grain between elevators and ships, Mr. Justice Brewer in a dissenting opinion very clearly showed the fallacy of confounding a "public use" with public interest as follows: "Surely the matters in which the public has the most interest are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, life, liberty and the pursuit of happiness; and to 'secure,' not grant or create, these rights governments are instituted. That property which a man has honestly acquired he

retains full control of, subject to these limitations: first, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation."

It was in a case arising in ever fruitful Kansas itself that the dissenting judge pictured the attempted regulation by the state of wages of labor as the logical and absurd result of the majority opinion of the court and which later came to pass in the Kansas law under consideration. In *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 34 S. Ct. 612, 58 U. S. (L. ed.) 1011, L. R. A. 1915 C1189, decided in 1914, the Supreme Court upheld the power of a state to regulate fire insurance rates. Mr. Justice Lamar (Chief Justice White and Mr. Justice Van Devanter concurring) in his dissenting opinion said that if public intent and not public use is to be the test applied in determining whether a given business is subject to regulation under the police power, "in view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn, cotton and wools, beef, pork, mutton and poultry, fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor, and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this twentieth century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed,

then the rates for life and marine insurance can be fixed. By a parity of reasoning the rates of accident, guaranty and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his private contracts of any sort, will become the center of a circle of price making legislation that, in its application, will destroy the right of private property and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property, which includes his right of contract to make property, his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of endorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident."

The Kansas act has been declared to be valid by the Supreme Court of Kansas in *State* v. *Howat,* (Kan.) 191 Pac. 585. While the court did not pass on the validity of the act as affected by the alleged unconstitutional extension of the police power, the case going off on the question of the power to punish for contempt for refusal to appear before the Industrial Court as a witness, it did take occasion to say: "Inasmuch as the police power extends to the protection of the welfare and convenience as well as the health, safety, and morals of the public, it may manifestly be invoked, as in the present instance, to prevent the interruption in the production of a commodity so vitally necessary to the people of this state as coal, so long as the means employed are not for some special reason obnoxious to constitutional provisions."

The uniform trend of the courts to uphold the extension of the police power by the states and the extremes to which this course may lead are strikingly shown by Mr. Wickersham in the article already mentioned, which he concludes as follows: "If the whole industry of the manufacture or preparation of food products may be enveloped in a public interest and regu-

lated at will by the Legislature, it need not stop, as does this act, with the process of converting the products of the soil from a natural state to a condition to be used for food, but it may reach back to the former, determine the conditions under which he shall labor and employ others to work for him, the prices he may charge for his crops, and the methods by which he may dispose of them. Indeed, there would seem to be no limit to the legislative discretion, and the individual no longer can say: 'Shall I not do what I will with mine own?' Because, as Aristotle says, 'all governments rest on the principle of self-preservation, and at times extreme measures must be allowed,' which is the philosophy upon which rests the police power of the State, are there to be no limits upon the right of the Legislature to interfere with and control the conduct of every man's business, to regulate the cost of his product and the price of his wares? If so, why are constitutions written, and bills of rights formulated? These are questions which naturally suggest themselves to lawyers, as they consider such statutes as the latest Kansas remedy for settling industrial disputes, and the judicial interpretation of the Constitution which would seem to sanction its enactment."

The writer, too, wonders with Mr. Wickersham—why are constitutions written? Also he knows of two or three little human privileges and pleasures that have so far been left to his individual whim but which undoubtedly could be and would be enveloped in the devouring maw of the police power once the attention of the legislature were called to their unregulated condition. But he will not point them out as examples of to what extremes this trend towards the extension of the police power may lead us for fear that the eager eye of some legislator, seeking whom and what he may regulate, may detect them, and then, farewell to even these remnants of personal liberty.

MINOR BRONAUGH, in *Law Notes.*